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BEFORE THE  
Federal Communications Commission  
WASHINGTON, D.C.

JUL 18 1997

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Federal-State Joint Board on ) CC Docket No. 96-45  
Universal Service )  
 )

OPPOSITION OF TELE-COMMUNICATIONS, INC. TO THE JOINT PETITION OF  
PACIFIC BELL, NEVADA BELL, AND SOUTHWESTERN BELL TELEPHONE  
COMPANY FOR STAY PENDING JUDICIAL REVIEW

Tele-Communications, Inc. ("TCI"), by its attorneys, hereby  
files its Opposition to the to the joint petition<sup>1</sup> filed by  
Pacific Bell, Nevada Bell, and Southwestern Bell Telephone  
Company (the "Petitioners") for stay of the rules adopted in the  
Commission's Report and Order in the above-captioned proceeding.<sup>2</sup>

I. INTRODUCTION AND SUMMARY

The Joint Petition requests that the Commission stay the  
rules adopted in the Report and Order in their entirety. More  
specifically, the Petitioners allege that the Commission has  
misinterpreted the statutory language of Section 254(h) of the

<sup>1</sup> See Federal-State Joint Board on Universal Service, cc  
Docket No. 96-45, Joint Petition for Stay Pending Judicial Review  
of Southwestern Bell Telephone Company, Pacific Bell, Nevada  
Bell, filed July 3, 1997 ("Joint Petition").

<sup>2</sup> Federal-State Joint Board on Universal Service, Report  
and Order, CC Docket No. 96-45, FCC 97-157 (released May 8, 1997)  
("Report and Order").

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Telecommunications Act of 1996<sup>3</sup> in allowing federal support for 1) Internet access and internal connections for schools and libraries, and 2) toll-free service to Internet access service providers to health care providers. Petitioners further challenge the FCC's decision to permit certain non-telecommunications providers to receive reimbursement from federal subsidy funds despite the fact that they are not obligated to contribute to the federal funds.<sup>4</sup> In doing so, the Petitioners utterly fail to meet the stringent standards for a stay of a Commission order. Thus, the Joint Petition must be denied.

## II. DISCUSSION

Under firmly established precedent, a party asking for a stay of a Commission order pending appeal must demonstrate: 1) a likelihood of success on the merits on appeal; 2) that irreparable injury will be suffered absent a stay; 3) that a stay will not substantially harm other parties; and 4) that the public interest favors preserving the *status quo* pending appeal.<sup>5</sup> Based

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<sup>3</sup> Pub. L. No. 104-104; 110 Stat. 56 (1996) (the "1996 Act").

<sup>4</sup> Joint Petition at 6-7. In addition, the Joint Petition claims that the Commission's rules are unconstitutional and specifically challenges the Commission's modifications to the lifeline program. *Id.*

<sup>5</sup> See Cuomo v. NRC, 772 F.2d 972, 974 (D.C. Cir. 1985); Washington Metropolitan Area Transit Commission v. Holiday Tours, 559 F.2d 841, 843 (D.C. Cir. 1977).

on these factors, a party must demonstrate "either a high probability of success and some injury or vice versa."<sup>6</sup> As demonstrated below, the Joint Petition fails to meet this standard.

**A. Petitioners are Unlikely to Succeed On The Merits.**

Subsection 254(h)(2)(A) of the 1996 Act expressly requires the Commission to establish "competitively neutral rules to enhance . . . access to advanced telecommunications and information services" for schools, libraries, and health care providers.<sup>7</sup> As the legislative history explains, this provision was intended to extend "the already existing universal service provisions within the legislation . . . to schools, libraries and hospitals."<sup>8</sup> The Commission correctly interpreted this mandate as granting it broad discretion to fashion rules as necessary to expeditiously provide universal service support to schools, libraries, and hospitals in a manner which meets the specific needs of those institutions. As the Conference Committee explained:

The Commission could determine that telecommunications and information services that constitute universal

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<sup>6</sup> Cuomo, 772 F.2d at 974. See, also, Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985) (where movant wholly fails to demonstrate irreparable injury in the absence of injunctive relief, the other requirements for a stay need not be reviewed).

<sup>7</sup> 47 U.S.C. § 254(h)(2)(A).

<sup>8</sup> 141 Cong. Rec. S7990 (daily ed. June 8, 1995) (statement of Senator Snowe).

service for classrooms and libraries shall include dedicated data links and the ability to obtain access to educational materials, research information, statistics, information on Government services, reports developed by Federal State and local governments, and information services which can be carried over the Internet.<sup>9</sup>

The Report and Order faithfully and effectively implements Congress' mandate by creating a means of effectively providing advanced services to schools, libraries, and hospitals within the current universal service model.

The arguments in the Joint Petition challenging the Commission's rules simply ignore elements of the statutory language and legislative history in an attempt to eviscerate the efficacy of Section 254(h). For example, contrary to Petitioners' arguments, Congress specifically stated that Section 254(h) (2) (A) would authorize the Commission to generally provide universal service funding to schools, libraries, and hospitals as part of the "already existing universal service provisions."<sup>10</sup> Moreover, the language in Section 254(h) (2) (A) requiring the Commission to adopt "competitively neutral" rules for providing federally-supported services to schools, libraries, and hospitals clearly contemplates non-carrier entities providing such services.<sup>11</sup> Indeed, because non-carriers are often the most

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<sup>9</sup> H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. 133 (1996) ("Conference Report").

<sup>10</sup> 141 Cong. Rec. S7990 (daily ed. June 8, 1995) (statement of Senator Snowe) (emphasis added).

<sup>11</sup> 47 U.S.C. § 254(h) (2) (A) (emphasis added).

efficient providers of such services, the Commission's ruling is consistent with the need to implement universal service in a cost-effective manner. Similarly, the Petitioners' claim that universal service support for Internet access and internal connections is somehow inconsistent with Section 254 stands in stark contrast to the specific references to such support throughout the legislative history of Section 254.<sup>12</sup> This failure on the part of Petitioners' to reconcile their position with the statutory language and legislative history amply demonstrates why the Petitioners are unlikely to succeed on the merits.

**B. The Petitioners Have Failed To Demonstrate That They Will Suffer Irreparable Harm If A Stay Is Not Granted.**

The Petitioners' claim that they will suffer irreparable harm if not granted a stay is predicated entirely on the assertion that the universal service requirements established by the Report and Order lack explicit support mechanisms.<sup>13</sup> Thus, the Petitioners argue that the possibility of future competition could cause implicit support losses, thereby creating the

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<sup>12</sup> See, e.g., 47 U.S.C. § 254(h)(2)(A) (authorizing support for "information services"); Conference Report at 133 (noting that universal service for classrooms and libraries shall include "data links" and Internet services); 141 Cong. Rec. S7981 (daily ed. June 8, 1995) (statement of Sen. Rockefeller) (specifically referencing the need to support a school's cost of having a computer "hooked up to the wall and then through that wall to the other wall").

<sup>13</sup> Joint Petition at 25.

possibility that, if forced to comply with the universal service rules, the Petitioners may suffer capital losses.<sup>14</sup>

As the Commission has previously determined, such speculative financial losses are insufficient to establish the irreparable harm required for a stay of the Commission's rules.<sup>15</sup> Rather, to be irreparable, an injury must be "certain and great; it must be actual and not theoretical."<sup>16</sup> Moreover, "[t]he possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm."<sup>17</sup> In the present case, Petitioners have failed to demonstrate that the loss of implicit support for universal service is a certainty or that such losses could not be fully reimbursed if the Petitioners were to eventually prevail on appeal. Thus, Petitioners have failed to meet irreparable harm requirement.

**C. Other Parties Interested In This Proceeding Will Be Severely Harmed If A Stay Is Granted.**

If the Commission were to stay its universal service rules in the manner requested by Petitioners, the provision of advanced

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<sup>14</sup> Id.

<sup>15</sup> See Virginia Petroleum Job. Assn. v. Federal Power Com'n, 259 F.2d 921, 925 (D.C. Cir. 1958) (financial losses are not irreparable).

<sup>16</sup> Wisconsin Gas, 758 F.2d at 674.

<sup>17</sup> Virginia Petroleum, 259 F.2d at 925.

services to schools, libraries, and hospitals would be substantially impeded for an indefinite period of time. As a result, both carriers and non-carriers ready to provide such services would be severely harmed in their ability to compete with incumbent LECs in providing advanced services to public institutions. More importantly, a stay of the universal service rules would undoubtedly limit and delay the provision of services to the public institutions Congress intended to support in passing Section 254(h). Given the importance Congress placed on providing schools, libraries, and hospitals with the most advanced communications capabilities,<sup>18</sup> any such delay or limit is unacceptable.

**D. The Public Interest Does Not Favor A Stay.**

In enacting the Telecommunications Act of 1996, both Congress and the President placed a primary importance on the provision of advanced services to schools, libraries, hospitals and consumers in rural, insular, and high-cost areas.<sup>19</sup> If the Petitioners' stay is granted, the educational, library, health care, and rural support contemplated by Section 254 would be

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<sup>18</sup> See, e.g., 1996 Act, § 706(a) (specifically requiring the Commission to encourage the provision, on a timely basis, of advanced telecommunications capabilities to schools).

<sup>19</sup> See Conference Report at 132 ("the ability of K-12 classrooms, libraries and rural health care providers to obtain access to advanced telecommunications services is critical"); Radio Address of the President to the Nation (Feb. 8, 1997) (stressing the importance of providing service to schools and libraries).

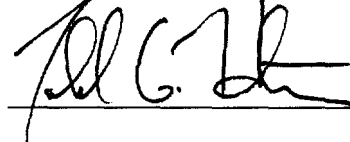
denied to these institutions. While the Petitioners challenge how such service should be paid for, the Petitioners offer no explanation of how denying or delaying such support could possibly be in the public interest. As a result, the Joint Petition must be denied.

**CONCLUSION**

For the reasons described herein, the Commission should deny the Petitioners' Joint Petition for stay of the Commission's universal service rules.

Respectfully submitted,

**TELE-COMMUNICATIONS, INC.**

A handwritten signature in dark ink, appearing to read "P.L. Verveer", is written over a horizontal line.

Philip L. Verveer  
Todd G. Hartman

**WILLKIE FARR & GALLAGHER**

Three Lafayette Centre  
1155 21st Street, NW  
Washington, DC 20036-3384

Its Attorneys

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